

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2009-0028-DWR

In the Matter of Permits 8511, 11357 and 15000B (Applications 11587, 12179 and 21471B)

U.S. Bureau of Reclamation

ORDER DENYING PETITIONS FOR EXTENSION OF TIME

SOURCE: Santa Margarita River

COUNTY: San Diego

WHEREAS:

1. The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permit 8511 to Fallbrook Public Utility District (Fallbrook) on April 23, 1951 pursuant to Application 11587. The permit authorizes collection to storage of 10,000 acre-feet per annum (afa) from the Santa Margarita River. The permit required that construction be completed by December 1, 1953 and full beneficial use of water be completed by December 1, 1958.
2. The Division issued Permit 11357 to Fallbrook on May 2, 1958. The permit authorizes collection to storage of 10,000 afa from the Santa Margarita River. The permit required that construction be completed by December 1, 1961 and full beneficial use of water be completed by December 1, 1966.
3. The Division issued Permit 15000 to U.S. Department of the Navy (Navy) on November 18, 1965. The permit authorizes collection to storage of 165,000 afa from the Santa Margarita River. The permit required that construction be completed by December 1, 1968 and full beneficial use of water be completed by December 1, 1970.
4. Order WR 73-50 approved the assignment of Permits 8511, 11357 and 15000B to U.S. Bureau of Reclamation (Reclamation). The order also required that Permit 15000 be split, and the portion put to beneficial use by the Navy (Permit 15000A) be licensed. The remaining portion of the right was assigned to Reclamation (Permit 15000B).
5. Order WR 83-11 approved extensions of time for the permits, extending the time for construction to December 31, 1990 and extending the time to complete full beneficial use to December 31, 1996. The order documents that there had been eight previous time extensions granted for Permit 8511; four previous time extensions for Permit 11357, and one previous time extension for Permit 15000B. Therefore, Order WR 83-11 was the ninth time extension for Permit 8511; the fifth time extension for Permit 11357 and the second time extension for Permit 15000B.
6. On December 23, 1996, the Permittee requested an extension of time to complete use to December 31, 2007. On August 26, 1997, the Division granted the request. The August 26, 1997 transmittal letter emphasized the importance of maintaining the time schedule and noted that any

further time extensions would be subject to the cause requirements of California Code of Regulations, title 23, section 844.

7. On February 2, 1998, the Division issued an order extending the time to develop the project and extended the complete use date another year to December 31, 2008.
8. At this time, 11 time extensions have been granted for Permit 8511; seven time extensions have been granted for Permit 11357 and four time extensions have been granted for Permit 15000B (counting the two separate time extension orders on the December 24, 1996 petitions).
9. Division records show that Permittee has failed to commence or complete construction work and complete application of water to beneficial use within the time provided under the permits. No diversion works have been built and no water has been diverted under the permits, as documented in the Progress Reports by Permittee. For example, the 2007 Progress Report by Permittee for Permit 8511 documents that Permits 8511, 11357 and 15000B were issued to construct two dams on the Santa Margarita River. The Progress Report box asking whether construction work has commenced is marked "No."

Following a 1984 Environmental Impact Study and 1989 Basin Wide Water Requirement and Availability Study, it was concluded that a two-dam Santa Margarita Project was no longer a feasible solution to water supply. Fallbrook prepared a Clean Water Act permit application for a single dam project in 1990, but abandoned the effort due to mitigation costs.

10. On February 1, 2005, Division staff met with the Permittee's representatives, among others, to discuss the Santa Margarita River Conjunctive Use Project (SMCUP). That meeting is memorialized in a March 15, 2005 letter from Katherine Mrowka to William J. Steele. At the meeting, Division staff expressed concern regarding the lack of progress under Permits 8511, 11357 and 15000B, and advised Permittee that it was uncertain whether the State Water Board would grant additional time to perfect the rights.
11. A December 11, 2007 letter memorializes a December 7, 2007 meeting between Division staff and the Permittee. At the meeting, the Permittee affirmed that it is not pursuing development of the surface storage reservoirs authorized by the permits, that the reservoirs have not been built and that water use under the permits has not begun. Instead, Permittee was considering a conjunctive use project involving underground storage. Division staff advised the Permittee of the need to address the non-use issue as part of the showing of cause for any extension of time petitions submitted.
12. On December 11, 2008, the Division advised the Permittee that it had received the petitions for time extension submitted on November 14, 2008. The petitions seek a 50-year extension of time to build an underground storage project. Since the Permittee intends to build a different project than the permitted project, change petitions are required. The Division returned the time extension petitions, but offered to hold this matter in abeyance for one year to provide opportunity for the Permittee to re-submit the time extension petitions along with change petitions and underground storage supplements describing any then-proposed project. This would allow the Division to evaluate the proposed project, as a whole.
13. On January 15, 2009, Permittee resubmitted the November 14, 2008 petitions for extension of time. These petitions are subsequently referred to as the 2009 petitions. The cover letter states that the time extension petitions are ready for processing and the Permittee is not aware of any reason that the petitions will need to be revised and resubmitted. Permittee states that the petitions are being resubmitted for either notice in the normal course of business, or to be held in abeyance from notice and processing pending receipt of the other filings needed to implement the reformulated project. The petitions document that no water has been used under the permits.

The petitions state that the extension of time is needed in order to pursue development of an alternate project, the SMCUP. The petitions document money expended on developing the alternate project, and indicate the progress that Permittee intends to make on the alternate project in the future. The petitions state that since 1996, the SMCUP Proponents have overcome substantial unavoidable obstacles and have diligently pursued conjunctive use approaches to put the water at issue to beneficial use.

However, the SMCUP is not the permitted project. As described on the petitions, this alternate project has a different point of diversion, method of diversion, and place of storage from the permitted project. Permittee has not requested modifications to the permits needed to implement the alternate project.

14. The Division has not publicly noticed the petitions.
15. The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use only upon a showing of good cause. (Wat. Code, § 1398.) Permittee must show that (1) due diligence has been exercised; (2) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (3) satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.
16. The permits were first issued between 1951 and 1965, and were granted a series of time extensions, with the most recent granted in 1998. Permittee has not shown that due diligence has been exercised. While some preliminary studies were conducted over the years, the two-dam project authorized by the permits has not been built. The project has been found to be environmentally and economically infeasible. (2009 time extension petitions.) No water has been used under the permits. (Ibid.)
17. Permittee has not shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided. Permittee did not move forward on the permitted project because it was found to be infeasible.

Permittee offers studies and other activities associated with developing an alternate water supply project, the SMCUP, as obstacles that could not be reasonably avoided. Regardless whether the scenario presented would present an obstacle to developing the SMCUP, activities related to this different project do not constitute an obstacle to developing the permitted project.

18. Permittee has not shown that satisfactory progress on the permitted project will be made if a time extension is granted. Permittee suggests that it will make satisfactory progress if the extensions are granted because Permittee intends to proceed with the SMCUP within the next 50 years. However, the SMCUP is not the permitted project. As noted previously, the permitted project has been found to be infeasible and Permittee has expressed that it does not intend to construct the envisioned dams.
19. The Division has not entered into a Memorandum of Understanding with Permittee for preparation of the California Environmental Quality Act document for the time extension petitions, because of the infeasibility of the permitted project.
20. Permittee has not shown good cause for the time extension.
21. The State Water Board has delegated the authority to act on requests for an extension of time to the Deputy Director for Water Rights pursuant to Resolution No. 2007-0057. (Resolution No. 2007-0057, section 4.2.7) The Deputy Director has re-delegated this authority to the Assistant Deputy Director.

Applications 11587, 12179, 21471B Permits 8511, 11357, 15000B

NOW, THEREFORE, IT IS ORDERED THAT THE STATE WATER BOARD, DIVISION OF WATER RIGHTS, HEREBY DENIES THE PETITIONS FOR EXTENSION OF TIME.

STATE WATER RESOURCES CONTROL BOARD

Original Signed by:

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: June 15, 2009

KMrowka:ds 4/14 and 4/20/2009
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